

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DANIEL M. MALONE,

Defendant.

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8:12CR190

**MEMORANDUM AND ORDER**

This matter is before the court on defendant Daniel M. Malone's objection, Filing No. [26](#), to the Findings and Recommendations ("F&R") of the United States magistrate judge, Filing No. [23](#), regarding defendant's motion to dismiss, Filing No. [16](#). The defendant is charged with failure to pay withholding and Federal Insurance Contributions Act taxes ("FICA") during the second quarter of the year 2006, ending June 30, 2006, in violation of [26 U.S.C. § 7202](#) (Count I); and during the fourth quarter of the year 2006, ending December 31, 2006, in violation of [26 U.S.C. § 7202](#) (Count II). The defendant seeks dismissal of the indictment filed on June 19, 2012 (Filing No. [1](#)), asserting that it violated his rights under the Sixth Amendment of the United States Constitution. A hearing on the motion to dismiss was held before the magistrate judge on October 10, 2012. Filing No. 22. The magistrate judge recommended that this court deny the motion to dismiss.

The defendant objects to these findings, and specifically, he contends the indictment was constitutionally defective as it fails to inform him of the essential criminal charge. The defendant also asserts that the indictment failed to allege facts showing the criminal conduct by him. Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(A\)](#), the court has conducted a de novo review of those portions of the F&R to which the defendant objects. *United States v. Lothridge*, [324 F.3d 599, 601](#) (8th Cir. 2003). The court has reviewed the entire record,

including the transcript of the hearing. See Filing No. [35](#). The court concludes that the magistrate judge's F&R is adopted in full as hereinafter set forth.

### **FACTS**

The court adopts the magistrate judge's factual findings set out in the transcript of the motion to dismiss proceedings held on October 2, 2012. Filing No. [35](#). The indictment sets out two counts of failure to pay FICA taxes under [26 U.S.C. § 7202](#). Specifically, during the second quarter of 2006, the defendant, Daniel M. Malone, deducted and collected taxes in the amount of \$23,505.87 from A.G. Ventures employees, which he subsequently failed to pay to the government. Furthermore, during the fourth quarter of 2006, Malone failed to pay the government \$15,714.71 of the monies he deducted and collected taxes from A.G. Ventures employees.

### **DISCUSSION**

The court agrees with the magistrate judge's conclusions for the reasons stated in the transcript of the motion to dismiss proceedings. The magistrate judge determined that an indictment, which includes allegations of specific facts containing the essential elements of the offense charged and instructs the defendant on what charges he must defend, is constitutionally sufficient.<sup>1</sup> The Eighth Circuit has held on numerous occasions that, "[a]n indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution." [United States v. Wessels](#), 12 F.3d 746, 750 (8th Cir. 1993); [United States v. Beasley](#), 688 F.3d 523, 532 (8th Cir. 2012). A conviction under [26](#)

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<sup>1</sup> The indictment includes a description of an employer's responsibilities under FICA; indicating that an employer is required to make payment for employees of Social Security and Medicare taxes which are to be turned over to the government. Furthermore, the indictment alleges that Malone owed, managed, and operated A.G. Ventures.

U.S.C. § 7202 requires a showing of a duty to collect, account for, and pay over the tax imposed by the title, as well as a showing that the defendant willfully failed to collect or truthfully account for and pay over such tax.

The magistrate judge found that the indictment specified that the defendant was required to withhold FICA taxes and also delineated the employer's responsibility for those taxes. Furthermore, the indictment stated the tax imposed on an employer under 26 U.S.C. § 7202 and alleged that defendant owned, managed, and operated A.G. Ventures. The indictment also stated that the defendant failed to pay FICA taxes to the government during the second and fourth quarter of 2006. The court agrees with the magistrate judge's conclusion that the indictment included allegations of facts which comprise the essential elements of the offense charged and further convey to Malone the charges he must defend. The court cannot conclude from this evidence that the indictment was so defective as to render it constitutionally insufficient. The court has reviewed the F&R of the magistrate judge and finds it to be correct in all respects.

THEREFORE, IT IS ORDERED:

1. The defendant's objections, Filing No. [26](#), to the F&R of the magistrate judge, Filing No. [23](#), are overruled.
2. The defendant's motion to dismiss, Filing No. [16](#), is denied.
3. The F&R of the magistrate judge, Filing No. [23](#), is adopted in its entirety.

DATED this 5<sup>th</sup> day of February, 2013.

BY THE COURT:

s/ Joseph F. Bataillon  
United States District Court Judge